SUPREME COURT OF APPEALS OF VIRGINIA.

CHILDRESS v. JORDAN.

Sept. 12, 1907.

[58 S. E. 563.]

Set-Off—Equitable Set-Off.—W., having purchased his partner's interest and given his note therefor, with a deed of trust on the property, and assumed payment of a partnership liability to a third person, thereafter sold to such former partner horses and mules included in the deed of trust at an aggregate sum sufficient to have satisfied the secured debt, if all of it had been applied to its payment. W. having failed to pay the debt due the third person, and being admittedly insolvent, his former partner paid the same by applying a sufficient amount of his indebtedness to W. arising from the purchase of the horses and mules. Defendant in the meantime purchased of W. certain of the trust property, and, having refused to pay the trustee the purchase money, the latter brought suit to recover the property or its value. Held, that W.'s partner was entitled to set off in equity the firm debt, which, because of the insolvency of W., he was compelled to pay, against his indebtedness to W., leaving the property purchased by defendant subject to the trust deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 9-11.]

Error to Circuit Court, Montgomery County.

Action by Robert L. Jordan, trustee, against James S. Childress. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Phlegar, for appellant.
Longley & Jordan, for appellee.

WHITTLE, J. The narrow question presented by this record for decision involves the correctness of the ruling of the circuit court in sustaining the application by Cowan of a certain payment in discharge of what we shall term the "Carper debt." The essential facts are as follows:

Wilson and Cowan were partners as liverymen, and the former purchased the latter's interest in the business for $800, giving his note therefor, with a deed of trust on the property as security, and also assuming payment (among other partnership liabilities) of the Carper debt, which amounted to $315. In February, 1906, Cowan purchased of Wilson horses and mules included in the deed of trust at the aggregate price of $870, a sum sufficient to have satisfied the secured debt, if all of it had been applied to its payment. Wilson, who was admittedly insolvent, failed to pay the Carper debt, and the firm note was protested, and subsequently

paid by Cowan June 22, 1906. In April, 1906, the plaintiff in error, Childress, bought from Wilson the trust property described in the declaration, and, having refused to pay the defendant in error, Jordan, trustee, the purchase money, the latter brought suit to recover the property, or its alternate value.

Though the action was in detinue, the parties waived a jury and submitted their rights to the court to be determined, as if the proceeding had been a suit in equity. Thereupon the court sanctioned the dedication by Cowan of a sufficient amount of the money due on his indebtedness to Wilson to discharge the Carper debt, leaving a balance due from Wilson to Cowan of $403.59. The court also fixed the value of the property bought by Childress at $350, and rendered judgment in behalf of the plaintiff against him for that sum, to which judgment Childress brings error.

We are of opinion that, upon the foregoing facts, Cowan was entitled in equity to protection against the Carper debt out of his indebtedness to Wilson. Courts of equity always recognize the influence of insolvency on the rights of parties touching the matter of set-offs, and in adjusting transactions between them will regard the equites of the solvent party, and so accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause.

The principle is illustrated by text-writers and numerous adjudged cases. The decisions of this court on the subject will be found in notes to the case of Feazle *v.* Dillard, 5 Leigh (Va. Rep. Ann.) 21. In the principal case Feazle was permitted, in equity, to set off the amount of a bond on which he was surety for Dillard, who was insolvent, against his own bond to Dillard in the hands of an assignee, though not due, he having become surety before notice of the assignment.

So, in this case, Cowan's liability to pay the Carper debt having attached before the rights of Childress accrued, his superior equity must prevail.

We are of opinion that the judgment of the circuit court should be affirmed.

MORGAN *v.* HALEY.

Sept. 12, 1907.

[58 S. E. 564.]

1. Partition—Actions for Partition—Nature of Remedy.—Though a suit for partition, under Code 1887, § 2562 [Va. Code 1904, 1310], cannot be made a substitute for an action of ejectment, yet a court of equity has jurisdiction to partition land, though defendant claims title to the whole tract, where he or those under whom he claims